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Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

SARA J. HARPER,
Petitioner,

v.

OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF OHIO,
Respondent.

On Petition for a Writ of Certiorari
to the Ohio Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

In many respects, we agree with petitioner's statement of the case. A few clarifications, however, are in order. As an initial matter, petitioner lists respondents in her caption as the "Office of the Disciplinary Counsel, The Supreme Court of Ohio, et al." Below the case was properly captioned as "In re Complaint Against Judge Harper," and this response is filed on behalf of the only appropriate respondent, the Office of the Disciplinary Counsel.

Next, petitioner suggests that she was punished by the court below for making truthful statements. She was not, and her petition therefore misstates the issue presented. The judgment indicates that she was reprimanded for making statements that were "untrue" (Petition at 107) and "inaccurate" (Petition at 108), *not* for "truthful criticism" of the judiciary, which is not only permissible, but according to the lower court also plays "an important function in our society." (Petition at 100).

Petitioner likewise fails to explain several critical facts underlying this case: *why* in other words she was reprimanded by the Ohio Supreme Court. While running for a seat on the Ohio Supreme Court, petitioner approved a television advertisement that was broadcast just days before the election in November 1994. The advertisement's narrator stated:

> On the Ohio Supreme Court, one Justice has a problem. It's money. Most of Resnick's money comes from just one place, the plaintiff lawyers who sue, sue, sue. Over $300,000.00 just from them. This small group of suing lawyers wants Resnick with her liberal rulings to make it easier for them to collect millions

> in fees. It's time for a change to Judge Sara Harper. Recommended, endorsed, highly rated, 20 years as a Judge, Marine Corps Lieutenant Colonel. Judge Sara Harper.

(Petition at 72.) While the narrator spoke, a photograph of Judge Harper's opponent, Justice Resnick, was featured with the phrase "Justice Has Problem." Then the words ". . . It's Money!" appeared. Following that, Justice Resnick's picture was shown with the caption "Resnick's Money." Then a large check was displayed with the words "Trial Lawyers" and "Sue & Sue" on the top left-hand corner of the check. In the portion of the check where one would normally see the dollar amount, the figure "Over $300,000.00" was shown. The check was signed by "Cheatem Good." Next the ad displayed the words "Resnick's Liberal Rulings Help Lawyers Collect Millions." The ad also pictured individual lawyers, next to which appeared attorney advertisements making various claims, including the following: "Experienced in recovering large money awards," "NO FEE UNLESS YOU COLLECT," "No Fee if No Recovery." (Petition at 72-73.)

The Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court found that Judge Harper's advertisement raised the following impermissible implications:

> (1) Certain lawyers are dishonest; (2) One justice is associated with those lawyers; (3) There is something improper about lawyers contributing to a judicial campaign; and (4) A justice appears to be the captive of one class of litigants, group of lawyers, or special interest.

(Petition at 106.)

The Ohio Supreme Court upheld these findings, and concluded that Judge Harper had violated two Canons of Ohio's Code of Judicial Ethics: she failed to conduct herself in a manner that promotes public confidence in the integrity and impartiality of the judiciary; and she failed to maintain the dignity appropriate to judicial office. (Petition at 109.) As a result, she received a public reprimand-- the mildest sanction for Ohio judges or attorneys found guilty of misconduct. *See* S. Ct. Rules for the Govt. of the Bar of Ohio, Rule V, § 6(B).

REASONS FOR DENYING THE WRIT

The petition should be denied for three independent reasons. First, and most importantly, no lower court split of authority is alleged. Nor does one exist on the question presented. Second, much of the petition does not even raise a federal question subject to further review; it concerns an interpretation of state law. Finally, the Ohio Supreme Court properly applied its own ethical canons, together with established First Amendment standards, in punishing petitioner's false and misleading speech while permitting her truthful statements and opinions to stand.

A. No Lower Court Split of Authority Exists.

Petitioner conspicuously fails to allege any split of authority among the state supreme courts or lower federal courts on the issues presented. The petition thus fails to establish any ongoing legal problem demanding the Court's review.

Nor is this application of First Amendment law unique. Other state courts have permissibly reprimanded judges, judicial candidates and attorneys for making false and misleading statements attacking the integrity of the judiciary

and the bar. *See In re Disciplinary Proceeding Against Kaiser*, 111 Wash. 2d 275, 759 P.2d 392 (Wash. 1988) (ordering public censure for judge who violated state judicial canons by suggesting that DWI defense attorneys could obtain favorable treatment for their clients from the judges's election opponent); *In re Johnson*, 240 Kan. 334, 729 P.2d 1175 (1986) (ordering public censure for county attorney who made false statements about his opponent's positions on crime and other issues during reelection campaign); *In re Riley*, 142 Ariz. 604, 691 P.2d 695 (1984) (ordering public censure for judicial candidate who suggested that the State could not receive a fair trial in the incumbent judge's courtroom).

In *Kaiser,* in fact, the Washington Supreme Court, like the lower court here, emphasized that truthful speech was not the object of its censure order. *See Kaiser*, 111 Wash. 2d at 289-91, 759 P.2d at 400-01 (stating that judge had every right to describe himself as "tough [and] no nonsense," and affirming judge's right to publicize the contributions his opponent had received from DWI defense attorneys). Rather, the challenged canons in this case, as in *Kaiser*, bar what has long been unprotected not only in the narrow field of judicial campaign speech, but also in the broader context of defamation or other First Amendment-related areas of the law: false and misleading speech. No conflict on this issue exists.

B. The Ohio Supreme Court's Interpretation of Its Judicial Canons Does Not Present A Federal Question.

Much of the petition focuses on the meaning of words in Ohio's Code of Judicial Conduct. In particular, petitioner contends that the Code's use of the word "should" fails to impose any obligation to abide by the Code's requirements.

Yet the meaning of these words is quintessentially a matter of state law -- one which in fact had already been resolved when petitioner approved this advertisement. *See Mahoning Cty. Bar Ass'n. v. Franko*, 168 Ohio St. 17, 23 (1958), *cert. denied*, 358 U.S. 932 (1959); *Cuyahoga Cty. Bd. of Mental Retardation v. Ass'n. of Cuyahoga Cty. Teachers*, 47 Ohio App. 2d 28, 33 (8th Dist. 1975) (holding that "the mandatory portions [of Ohio's Code of Judicial Conduct] are set forth by the use of the word 'should'"). At any rate, the important point is that the question concerns an issue of State law.

C. The Ohio Supreme Court Correctly Punished Speech That It Found False and Misleading.

Contrary to petitioner's suggestion, the Ohio Supreme Court carefully noted that it was not punishing her truthful statements or her opinions, but rather the false assertions of fact and the inaccurate representations shown in her advertisement. As the lower court made clear, "the Canons do not prohibit truthful criticism, so long as the criticism is done fairly, accurately, and upon facts, not false representations." (Petition at 100.) "By the same token, however, First Amendment protection does not adhere to statements of opinion that imply false assertions of fact." (Petition at 105.)

Petitioner also raises overbreadth and vagueness challenges to the Ohio judicial canons. Each is defective. The mere fact that one can conceive of some impermissible applications of a statute, as petitioner attempts to do here, does not suffice to show overbreadth. *See City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). As the court below correctly observed, the problem of overbreadth may be avoided if a state court or enforcement agency has narrowed the regulation by reasonable construction. *See*

United States Civ. Serv. Comm'n. v National Ass'n. of Letter Carriers, 413 U.S. 548, 580 (1973).

Truthful criticism of the judiciary simply is not sanctionable under Ohio's judicial canons, as the court below noted, and those canons therefore fall well within this Court's own First Amendment jurisprudence. Nor can petitioner point to any incidents of overbroad application by Ohio courts of the canons under which she was reprimanded. They have been interpreted to permit fair, accurate and truthful criticism of the judiciary. (Petition at 100.)

No less mistaken is the vagueness challenge. Petitioner had fair warning that her conduct was prohibited in view of Ohio's earlier interpretations of its disciplinary rules, which clearly gave notice that she enjoyed no privilege falsely to represent either Justice Resnick's ties to one class of supporters or the legality of those supporters' actions. In Ohio, moreover, parties are provided by court rule with the opportunity to obtain advisory opinions about proposed conduct from attorney disciplinary officials, and petitioner certainly could have pursued that route had she been uncertain about the propriety of running the ad. *See* S. Ct. Rules for the Govt. of the Bar of Ohio, Rule V, § 2(C).

Prior decisions of this Court likewise put her on notice that the First Amendment's protections do not extend to opinions that imply false assertions of fact. *See Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) ("the knowingly false statement and the false statement made with reckless disregard for the truth do not enjoy constitutional protection"); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990) (finding no separate constitutional protection for a statement solely because it might be labeled as an opinion, and permitting libel suit where statement could be read to imply an assertion that could be proved true or false);

Masson v. New Yorker Magazine, 501 U.S. 496, 516-17 (1991) (holding that defamation can occur when the speaker's words change the meaning of otherwise constitutionally protected speech).

As the lower court noted, moreover, this Court has previously rejected a vagueness challenge to the constitutionality of a regulation that punished commissioned officers for "conduct unbecoming an officer and a gentleman." *See Parker v. Levy*, 417 U.S. 733, 738 (1974). In *Parker*, the Court focused on the fact that the military was a "specialized community governed by a separate discipline from that of the civilian." 417 U.S. at 744. The Court also emphasized that the military had developed customs and usages that imparted meaning to its codes of conduct. 417 U.S. at 746-47. Given the legal community's equally specialized disciplinary mechanisms, and the public's appropriate expectations concerning judicial integrity, there is every reason for the public and its courts to demand that judges likewise adhere to a particular code of conduct.

While the Ohio Supreme Court found nothing wrong with Petitioner's effort to inform the public that Justice Resnick received substantial contributions from the Ohio Academy of Trial Lawyers, *see* Petition at 105 -- a truthful statement -- and imposed no penalty for the ad's suggestions that Justice Resnick was liberal and that plaintiffs' lawyers sought her reelection, *see Id.* -- both expressions of opinion -- it found that her ad also included several false assertions of fact, which went beyond protected "rhetorical hyperbole." *Milkovich*, 497 U.S. at 17. The words "Cheatem Good" on a check from "Sue & Sue" while the words "Resnick's Money" were shown on the screen, together with spoken words and a visual image indicating that Justice Resnick had a "problem [with] money," could well lead a reasonable person to conclude that Justice Resnick was improperly

receiving money from attorneys, and that lawyers supporting her reelection were dishonest. (Petition at 108.) The advertisement improperly conveyed these false and misleading messages, and it was those false factual assertions that led to her reprimand.

The lower courts have long recognized a compelling state interest in judicial integrity. *See Stretton v. Disciplinary Bd. of Supreme Court of Penn.*, 944 F.2d 137, 142 (3rd Cir. 1991); *Morial v. Judiciary Comm'n. of La.*, 565 F.2d 295, 302 (5th Cir. 1977) (en banc), *cert. denied*, 435 U.S. 1013 (1978); *Berger v. Supreme Court of Ohio*, 598 F. Supp. 69, 75 (S.D. Ohio 1984). And, as this Court noted in *Cox v. Louisiana*, 379 U.S. 559, 565 (1965), "[a] State may also properly protect the judicial process from being misjudged in the minds of the public." Both the Code of Conduct for United States Judges and the ABA's Model Code of Judicial Conduct admonish judges to strive to maintain the integrity and independence of the judiciary, noting that "violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law." (Commentary to Canon One.)

Ohio's judicial canons, like those of many states and of the federal government, are designed to ensure that public confidence in the State's elected judiciary continues. The Ohio Supreme Court's carefully reasoned and balanced decision to allow petitioner's opinions and truthful criticisms to stand, but to impose its mildest sanction for petitioner's statements implying facts which were neither dignified nor accurate, permissibly advances these important goals.

CONCLUSION

For the foregoing reasons, we respectfully submit that the writ should be denied.

Respectfully submitted,
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